Federal Acts

Drug, Device and Cosmetic Act of October 26, 1951, 65 Stat. 648; 21 USC §321 et al. (App. C-19).

Act of May 9, 1941, Ch. 97; 55 Stat. 184; 5 USC 623 d (App. C-20).

Act of June 25, 1948, Ch. 646, §1; 62 Stat. 928; 28 USC §1254 (App. C-19).

Pennsylvania Acts

The Medical Practice Act, June 3, 1911, PL 639, 63 Purd. Stat. §401a (App. C-23).

The Dangerous Drug Act of 1955, Dec. 28, 1955, PL 913 (not in digest because later amended) (App. C-20).

Act of Apr. 6, 1951, PL 68; 28 Purd. Stat. §110 (App. C-21).

Act of Jun. 12, 1951, PL 533; 50 Purd. Stat. 1072 (App. C-21).

Act of Dec. 14, 1955, PL 853 (App. C-22; ~~C-1~~); (No. 255).

E. STATEMENT OF THE CASES

Two actions in trespass were instituted by petitioner, as guardian (later substituted as administrator), against respondent Doctors Hecker and (Wright) Hecker, respectively superintendent and medical director of Embreeville (Pa.) State Hospital, for permanent brain damage to his ward allegedly caused by chlorpromazine (trade name thorazine, here called CPZ), a drug administered to her (Exh. P-1-E; R·16a) on prescriptions of three unlicensed subordinates of respondents (Exh. P-1-C, R 7-9a; Exh. P-3,

19a), in violation of the Dangerous Drug Act of 1955 (Pa.) which, by reference to the Federal Drug, Device and Cosmetic Act, and through official action under the latter, classified the drug as "dangerous", and limited prescription of it to Pennsylvania licensed doctors (Exh. P-2, p. 15b—Resp. Supp. App.). The Federal act also limited prescription to licensed doctors. Two of the subordinates [(Mainero) deSchut and deSchut] were not licensed anywhere (R 19a); (Mainero) deSchut prescribed even after expiration of her student-training period (R 7a, July 11, 13, 22, R 19a); one of the subordinates (Holt) was licensed, but not in Pennsylvania (R 19a). The cases were tried together to a jury in February, 1963, after mistrial in December, 1962. Verdicts and judgments for both respondents resulted, new trials were refused, the Court of Appeals affirmed (App. B-16, 17), and rehearings were refused (App. B-15).

The causes were companion cases, tried together in the District Court, argued together in the Court of Appeals and involved, in some parts identical, and in all parts closely related, questions.

Mrs. Jackson was poisoned by over-administration of CPZ in Embreeville State Hospital (135a, l. 7; 141a, l. 19 et seq.; 142a, 147a, 148a, 149a, l. 26). For about five years before Embreeville, at times she manifested mild delusions. She was not incapacitated; was well oriented otherwise and in general carried on much as a normal person. She had been mildly diabetic since the fall of 1954 (R 74-80a, 117a, l. 13; 128a, l. 25).

Because of some lack of judgment (R 79a, l. 4), her husband on April 26, 1957, took her to Embreeville to stay until he could find a companion to be with her (R 80a, l. 29). Administration of CPZ, a drug often attended by well-known highly individualized adverse reactions (R 111a, l. 22; 114a, l. 25; 150a, l. 24) began on May 6, 1957 (Exh. P-1-E, R 16a). In May, CPZ produced an intense skin rash, suffusing face, neck, chest, arms and legs (R 83a,

l. 27, Exh. P-8, R 21a, the only then "present" medication being CPZ, Exh. P-1-E, R 16a), nurses' notes (Exh. P-1-D, R 10-15a) show untidiness, central depression of the central nervous system, polyuria, incontinence, parkinsonianism and toxicity, all recognized effects of the drug. Confusion began in late May and progressed to July 19 (R 83-84a) when the drug had produced great restlessness and complete confusion, staring and glassy eyes, rigid limbs, tremors, she could utter only monosyllables forced by grunting with apparently great difficulty, had difficulty in swallowing and walking—the latter with a lunging gait, her body arched forward (R 84-86a, 128a last 4 lines, 129a first 21 lines, 141a). A swift, radical, complete change of personality had resulted (R 129a, l. 1 to 21; 104a, l. 17); the drug continued to July 23, inclusive (Exh. P-1-E, R 16a).

She was never confused before except for brief periods following, and caused by, electro-convulsive "treatments" in 1953 and 1956 (R 112a, 154a first 9 lines). On July 26 Mrs. Jackson's husband took his wife to Dr. Wright and consulted her about the condition (R 86-89a) and on August 2 saw Dr. Hecker about Mrs. Jackson (R 90-5a), but the drug was resumed, intramuscularly (a more potently operating method of administration) on August 1 and went on for six more days until her husband removed her from the hospital on August 7, 1957 (R 95a, l. 29). Dr. Hecker refused on August 2 to do anything about her (R 94-5a, 114a). Total drug administration was 85 days, 300 mg. a day for most of the period. Noludar, another dangerous drug, was also administered for part of the time (P-1-E, R 16a).

The parkinson-like syndrome abated largely by late October, 1957, but hopeless confusion and body and leg jerks, not present before the drug, continued 4½ years to her death on December 28, 1961 (R 97a, l. 27-9; 101-2a). Bereft of her mind, she was never again able to carry on in the nearly normal way she did before the drug (R 99a,

101a, 104a, 118a). The diabetes was under good control to her death (R 134a, l. 12).

Dr. Hecker, as superintendent, had the duty to receive and care for Mrs. Jackson (App. C-21, 22, 23). Dr. Wright was in charge of the three subordinates and Mrs. Jackson (R 158a). In July and August, 1957, both respondents charged the confusion to diabetes (R 87a, 89a, 94a, 108a, 116a); diabetes did not cause the confusion because there was no acetone in the blood or urine, (a prerequisite to diabetic acidosis), prior to July 25, 1957, (R 131a, 133a bottom half, Exh. P-1-B, R 5-6a; Exh. P-1-D, R 10-15a); there was a minimal trace of acetone on a few occasions after July 25, but insufficient to produce confusion. No insulin was administered at the hospital until July 11, 2½ months after entrance, and at no time in Mrs. Jackson's stay there was more than a minimal amount of insulin given (R 132a, l. 17, Exh. P-1-E, R 16a, P-1-D, R 12-15a). CPZ was stopped on July 23 (Exh. P-1-E, R 16a) but Dr. Wright directed on July 26, *three days after the drug had been stopped*, "Cut Thorazine" [stop the drug] (Exh. P-1-C, R 8a).

Drs. Stahlnecker and Staples, who, respectively, had examined Mrs. Jackson on July 26 and 31, 1957, while she was still in Embreeville, testified for petitioner, stating there was overdosage and that confusion on those dates was due to the drug, but absolved the drug as a substantial contributing cause of the *permanent* confusion in Mrs. Jackson, although they had stated to her husband in preparation for trial that it was (affidavits in support of motions for new trials, R 61-65a). Dr. Winkelman, who had examined Mrs. Jackson shortly after her removal from Embreeville, stated in preparation that the drug had caused hypotension—dilation of arteries—(a well-known effect of the drug)—reducing or stopping blood, and consequently oxygen supply, to the brain, as a result of which the brain was damaged, but refused to appear as a witness in the cause, saying, "I would not want to do anything which would make me a social out-

cast." (R 63-4a). Dr. Gottlieb, an *allergy specialist* and instructor in allergy in the University of Pennsylvania Medical School, refused to testify because he "did not know much about the drug" (R 66a).

G. BASIS FOR FEDERAL JURISDICTION

Diversity of citizenship is the basis for jurisdiction in the District Court; petitioner was and is a citizen of New Jersey and respondents were and are citizens of the Commonwealth of Pennsylvania.

The Federal Constitution, Article III, Section 2:

> "The judicial power shall extend . . . to Controversies . . . between Citizens of different States. . . ."

H. ARGUMENT AMPLIFYING REASONS RELIED ON FOR WRIT

i. Application and Operation of Unconstitutional Decisional Rule.

Except where circumstances are said to be within the common understanding of lay persons, Pennsylvania, like most other states, by decisional rule purportedly requires expert testimony to establish a doctor's negligence in his professional acts or non-acts, including supervision of subordinates. In a practical way this means that a plaintiff cannot succeed without testimony of another *doctor*, because it is a practical impossibility to find and produce a lay expert; even if one found a lay expert, a judge would probably say, "No medical degree, no medical expert; objection sustained." So, plaintiff must lose, for, also in a practical way, it is an impossibility to find a doctor who will testify against another doctor. Contrary instances are so infinitesimal in number as to be dismissed as rare mutations.

Every judge and every lawyer knows this. See blistering attacks by Carroll, P. J. (Common Pleas, Philadelphia)

and Justice Musmanno, in *Demchuk v. Bralow*, 404 Pa. 100, 106, 170 A. 2d 868, 871.

Present counsel for petitioner, preparing for trial, talked with Drs. Stahlnecker and Staples, the former a long time family doctor, the latter who had at times between 1952 and 1957 treated Mrs. Jackson; each gave his opinion that CPZ was a substantially contributing cause of brain damage (Affidavit in support of motion for new trial, R 61-5a; in Pennsylvania there may be more than one proximate cause). Relying on these opinions and in an effort to comply with the expert rule, counsel subpoenaed both doctors. Both absolved the drug as a cause of permanent injury (R 137a, l. 19, 155a, l. 11-19) and Stahlnecker denied what he had told me (R 138a). The case was hopelessly lost. Pursuing the effort to discredit Stahlnecker could only have negatived his denial; it would not have been affirmative evidence of cause. Discrediting Staples would have done no more.

This constitutional question could not have acutely arisen in any way other than as it did, for there is now concrete proof on the record in this very case of the impossibility of the rule.

Suggesting one's own veracity may be ungenteel, but some indication of the truth of the affidavits may lie in the fact that a lawyer would have to be an imbecile to put a doctor on the stand without having had the latter's prior support of the claim of injury, cause and negligence. Winkelman (who could not have been compelled to testify as an expert) sums up the rationale of this whole iniquitous practice in his protest that he would not want to do anything which would make him a social outcast (R 63-4a). All three of them knew what the drug had done to Mrs. Jackson.

Necessarily postulating that a plaintiff cannot succeed against a doctor, we perforce conclude that the rule is unconstitutional, for application of it presupposes availability of unavailable evidence. Placing so heavy a burden on the remedy as to make it totally unavailing is a denial of due

process: *New York Times v. Sullivan*, U. S. , 84 S. Ct. 710; this applies to operation of a decisional rule: *CB&Q v. Chicago*, 166 U.S. 226, 17 S. Ct., 581, 582; *1621 Inc. v. Wilson*, 402 Pa. 94, 103, 166 A. 2d 271, 275; *Tribune Co. v. Thomas*, 120 Fed. Supp. 362, 369.

The state says in effect: Injury from a doctor's negligence is a wrong. For every wrong we supply a remedy—a right of action to attempt to prove the wrong. But we will let you succeed only if you produce evidence of a certain type, which we know in advance is unavailable. Hence in actuality, you may not avail yourself of the remedy which due process requires. Absent substantial remedy for what the law says is a wrong (Pennsylvania recognizes the right of action), due process is wanting. Regard must be had to substance and not form: *CB&Q*, supra. A right of action, *once accrued*, is a property right which the state may not take away without provision of another adequate remedy: *Wilkes Barre v. Mundy*, 18 Fed. Supp. 65. The Fourteenth Amendment preserves the right to redress by some effective procedure: *Gibbes v. Zimmerman*, 290 U.S. 326, 54 S. Ct. 140, 142.

It is time to see in this situation, reality, the supposedly constant aim of the law, just as this Court did in the Segregation Cases, in Gideon and Wainwright and Thompson and Louisville. All 190,000,000 people in this country are potential, many are actual, victims of enforcement of this rule in favor of about 240,000 doctors.

Criticism of the case recently decided by this Court is not suggested, but it seems doubtful that greater injustice will be averted by preventing interrogators from addressing witnesses by given names than would be by striking down this unrealistic legalism. The impossibility of the rule demands that we be permitted to go to a jury without being demolished in advance by a rule based on a fiction—by law which metes out justice—by law which looks through appearance to discern reality.

It appears that this question has not been settled by this Court; it should be because of its actual and potential serious impact on every person in this country.

ii & iii. EXCLUSION OF COUNSEL AND LACK OF TIME.

Exclusion of counsel, in substance a real party in interest, from aiding succeeding counsel, the latter pushed by the defense into trial before he could adequately study the voluminous material vital to the case, was a denial of due process (R 137-8a). This was the equivalent of putting a party out of the courtroom in the trial of his own case; presence, without leave to consult and guide, is the equivalent of absence. See: *Arrington v. Robertson*, 114 F. 2d 821, 823; 53 Am. Jur. 42, §24. One disastrous result was the improvident withdrawal of the record of Philadelphia Psychiatric Hospital, vital as showing the unending confusion there, 4½ months after it began (P-9, R 159a).

iv. THE CHARGE WAS A DENIAL OF DUE PROCESS.

In a score or more instances, every item of evidence favorable to defense was stated as *fact*, not as matters which the jury *might find* as fact, or to which someone testified. Not a single item of petitioner's evidence, favorable to his case, was stated *either as fact or otherwise* except that "you have heard of the *possible* side effects the use of the drug *may* have had." "You have heard that the use of the drug *may* have caused toxic confusion." Yet these were testified to as *facts*, not *mere possibilities*. The charge was one-sided in the extreme, so much so that the damage was irremediable, the Judge cautioning the jury over and over, not merely stating his opinion, but in terms plainly indicating that they could not properly find for petitioner. Still, defense testimony was but 31 pages out of a record of 507 pages. My testimony, none of it denied, comprised 169 pages yet he made no reference to a single

word of it. Obviously the charge was a clear departure from the fair course of a trial. He told the jury to pass on the qualifications of the subordinates, to determine whether treatment fell below the proper standard, referred to programs for subordinate trainees, stated that expert testimony was necessary, that respondents were liable only for their own conduct, that the non-licensed status did not establish incompetence. Once he told the jury that deSchuts were licensed, once that they were not, and once to determine whether approval for training was the equivalent of a license! All were completely immaterial and highly prejudicial in view of the express terms of Federal and State statutes, forbidding prescription by a non-licensee.

v. REFUSAL TO CHARGE.

The trial judge refused many proper charge requests of petitioner (R 23-35a).

vi. FUNDAMENTAL ERROR.

Fundamental error was committed by defense counsel's reading from a book on CPZ; this was highly prejudicial and irremediable for it had the effect of apparently contradicting the confusion produced by the drug by showing that other persons had taken greater doses of the drug without ill effects. (R 166a, l. 11). The effect of the printed word on lay persons is common knowledge.

vii. GENERAL.

Compression of this petition to try to keep within the rule leaves little space for other important aspects of the case. Causation, injury and negligence were shown. Liability flowed, as to Hecker, from his statutory duty of care and to appoint subordinates (App. C-23), his failure, as head administrator, properly to supervise, permitting the drug to continue after knowledge of Mrs. Jackson's condi-

tion (R. 95a; App. 21, 22); as to Wright, from her like lack of supervision and her knowledge of the allergy, a sure danger signal, almost two months before the radical parkinsonianism and utter confusion (Exh. P-8, R 21a); as to both, from allowing incompetents to handle a dangerous agency (Restatement, Torts §308; *Anderson v. Bushong*, 404 Pa. 382, 386-91, 177 A. 2d 771, 773), and from allowing unlicensed persons to prescribe the drug in direct violation of the Dangerous Drug Act, which, given injury, was, without other proof, — negligence per se: *Jinks v. Currie*, 324 Pa. 532, 537, 188 A. 356, 358; Restatement, Torts §286. Nor, as a matter of law could there be any standard for one statutorily declared (unlicensed) to be incompetent (Exh. P-3, R 19a).

So it will not be thought that the medical practice act of 1911 allowed these incompetents to prescribe: The Dangerous Drug Act of 1955, *specific* in its requirement that *only a Pennsylvania licensed doctor might lawfully prescribe a dangerous drug* [*CPZ*], necessarily takes precedence over the *general* act passed 44 years before and, prior to 1957, last pertinently amended in 1941.

Any supposed immunity of public employees from liability for acts of subordinates is unavailing *where the superior cooperates in the wrong by lack of supervision*, e. g. by allowing legally incompetents to prescribe, in violation of law, a drug limited by the federal act to dispensing on the prescription of a licensed practitioner (Cert. of Secretary of Dept. of Health, Education and Welfare, Exh. P-2, 15b, Resp. Supp. App., ~~App. 20~~); admitted without objection. See *Dowler v. Johnson*, 225 N.Y. 39, 121 N.E. 487, by Judge Cardozo quoted in approval in *Orris v. Roberts*, 392 Pa. 572, 578, 141 A. 2d 393, 396. See also 43 Am. Jur. 89, §§279, 281.

Erroneous instructions having been given, even if the jury might have concluded that cause, injury or fault was or were not shown, no one can say what they might have found on proper instructions.

It is respectfully submitted that the Courts below have grievously departed from basic principles of elemental justice as enunciated by this Court.

WHEREFORE petitioner prays that certiorari issue herein.

ROBERT F. JACKSON
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,581
No. 14,582

Opinion Of The Court

(Filed April 10, 1964)

PER CURIAM.

Though these appeals were argued zealously and exhaustively on behalf of the appellant, our own study of the record convinces us that the trial judge dealt with all of appellant's contentions without any substantial error and most fairly.

The judgments of the district court will be affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,581
No. 14,582

Sur Petition For Rehearing

The petition for rehearing filed by Robert F. Jackson, Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court:

Dated: May 5, 1964

McLAUGHLIN
Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,581

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of February 11, 1963 of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF
Clerk

April 10, 1964.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,582

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of February 11, 1963 of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF
Clerk

April 10, 1964.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 26,209
(14,581)

Judgment

Before LUONGO, *J.*

AND NOW, to wit: February 11th, 1963, in accordance with the Verdict, it is ORDERED that Judgment be and is hereby entered in favor of Defendant, Arthur O. Hecker, and against Plaintiff, Mortimer W. H. Cox, Administrator of the Estate of Leona A. Jackson, Deceased, with costs.

By THE COURT:

Attest:

R. J. GREENWOOD,
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 26,210
(14,582)

Judgment

Before LUONGO, *J.*

AND NOW, to wit: February 11th, 1963, in accord-

ance with the Verdict, it is ORDERED that Judgment be and is hereby entered in favor of Defendant, Eleanor R. Hecker, also known as Eleanor R. Wright, and against the Plaintiff, Mortimer W. H. Cox, Administrator of the Estate of Leona A. Jackson, Deceased, with costs.

By THE COURT:

Attest:

R. J. GREENWOOD,
Deputy Clerk

APPENDIX C

Constitutional and Statutory Provisions and Statutes Involved

The Constitutional and statutory provisions in force at the time here concerned which the cases involve are as follows:

UNITED STATES CONSTITUTION

Article III §2

"The judicial power shall extend . . . to Controversies . . . between Citizens of different States. . . ."

Fifth Amendment:

"No person . . . shall be deprived of . . . property without due process of law; . . ."

Seventh Amendment:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ."

Fourteenth Amendment:

"Section 1 . . . nor shall any State deprive any person of . . . property, without due process of law; . . ."

STATUTES:

Federal

Act of June 25, 1948, Ch. 646 §1; 62 Stat. 928; 28 USC §1254

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

Drug, Device and Cosmetic Act (Oct. 26, 1951, §1; 65 Stat. 648; 21 USC §321 and §353)

"§321. . . .

For the purpose of this chapter—

* * * * * * *

(g) The term 'drug' means (1) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; . . ."

"§353. . . .

* * * * * *

(1) A drug intended for use by man which—

* * * * * *

(B) Because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or

(C) is limited by an effective application under section 355 of this title to use under the professional super-

vision of a practitioner licensed by law to administer such drug, shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

* * * * *"

The Federal Act of May 9, 1941, Ch. 97; 55 Stat. 184; 5 USC §623d:

"§623d. Seal.

. . . Copies of any books, records, papers, or other documents in the Department of Health, Education, and Welfare shall be admitted in evidence equally with the originals thereof when authenticated under such seal. . . ."

Pennsylvania

Dangerous Drug Act of December 28, 1955, Pamphlet Laws 913; [not in any digest in its form in effect at the time here material because it was since amended]:

"Section 2. As used in this act:

(1) 'Dangerous drug' means a drug intended for use by man: which . . .

(b) because of its toxicity or other potentiality for harmful effect or the method of its use or the collateral measures necessary to its use, is not safe for use, except under the supervision of a practitioner, licensed by law, administer or prescribe such drug; or

(c) is limited by the Federal Food, Drug and Cosmetic Act to use under the professional supervision of a practitioner, licensed by law, to administer or prescribe such drug, . . .

(2) 'Prescription' means a written order and, in cases of emergency, a telephonic order for a dangerous drug, issued by a physician, dentist or veterinarian, duly licensed to practice in this State, in good faith, in the course of his professional practice, ...

* * * * *

Section 5. No dangerous drug shall be sold at retail or dispensed to any person, except under the prescription of a duly licensed physician, ...

* * * * *"

Act of April 6, 1951, §1, Pamphlet Laws 68; 28 Purd. Stat. §110:

"§110. Licensure or non-licensure status

The certification of a duly authorized representative of any administrative department, board or commission, attesting to the licensure status or non-licensure status of an individual, as shown by the required official records, shall be received as evidence in all courts in this Commonwealth in the trial of any case."

Act of June 12, 1951, (P.L. 533, art. I, §102; 50 PS §1072 et seq.) as last pertinently amended Jan. 14, 1952 (P.L. 2053, §1.)

"§1072. Definitions

As used in this act, unless the context clearly indicates otherwise, the following words and phrases shall have the following meanings:

(1) 'Care' shall include reception, detention, transfer, leave of absence, discharge, custody, care, ..."

(8) 'Institution' shall mean any State or licensed place, public or private, for the care of patients. The term shall include 'mental hospital', . . . (15) 'Superintendent' shall mean the physician in charge of the administration of an institution, . . .

* * * * *

"§1091. Places for the care of patients

(a) In this Commonwealth patients shall be cared for

(1) In the following institutions: . . . Embreeville State Hospital

"§1136. Qualifications, etc., of superintendents

The superintendent of every State institution shall be a physician with at least seven years training or experience, or both, in the care of patients.

"§1181. Admission by superintendent on application of relative, etc., and physician's certificate

(a) Application for admission as a patient may be made in the interest of—(1) Any person who appears to be mentally ill or in such condition as to need the care required by persons who are mentally ill, to the superintendent of any mental hospital; . . . (f) On receipt of an application and certificate, the superintendent may receive and detain the person sought to be admitted as a patient.

* * * *"

Act of April 9, 1929, P.L. 177, as amended by §6 of the Act of Dec. 14, 1955, P.L. 853 (No. 255) (Not in Purd. Stat. because later amended)

"Section 6. The act . . . is amended by adding, after section 2313, three new sections to read:

Section 2313.1. Commissioner of Mental Health. —The Secretary of Welfare shall appoint, with the approval of the Governor, a Deputy Secretary who shall have the title of Commissioner of Mental Health and who shall be a psychiatrist with at least seven years' training and experience in the care of patients. The commissioner of Mental Health shall . . . recommend to the Secretary of Welfare the appointment of the superintendents of state mental institutions who in turn shall assign, appoint and dismiss personnel of the institutions. . . ."

Medical Practice Act of 1911, June 3, 1911, Pamphlet Laws 639 §2 as amended; 63 Purd. Stat. §§401a, 409

"§401a. It shall not be lawful for any person in the State of Pennsylvania to engage in the practice of medicine and surgery . . . excepting those hereinafter exempted, unless he or she has first fulfilled the requirements of this act and has received a certificate of licensure from the board, which license shall be properly recorded in the office of the Superintendent of Public Instruction at Harrisburg. . . .

* * * *

"§409 (a) All persons who have complied with the requirements of the rules and regulations of the board, . . . shall receive from the Department of Public Instruction, acting for the said board a licensing certificate entitling them to the right to practice medicine and surgery, . . .: Provided, That this section relating to certificates to practice medicine and surgery, shall not apply to . . . any one while actually serving as a student intern under the supervision of the medical or surgical staff in any legally incorporated hospital or State hospital: . . .

Restatement, Torts

§302: "A negligent act may be one which: (b) creates a situation which involves an unreasonable risk to

another because of the expectable action of the other, a third person, an animal or a force of nature."

§308: "It is negilegence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others."

"§286 The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if: (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and (b) the interest invaded is one which the enactment is intended to protect; and, (c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests results from that hazard; and, (d) the violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action."

§ 320